United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

976

5-6

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 23945

MORAUER & HARTZELL, INC.

AND

LIBERTY MUTUAL INSURANCE COMPANY

APPELLEES

VS.

ALEXANDER McCLANAHAN

APPELLANT

APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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STATEMENT OF QUESTIONS PRESENTED

1. Whether a settlement and compromise of an employee's third party tort action, reached, arrived at and concluded in the course of a pre-trial conference in the Trial Court's Chambers constitutes an "adjudication" of the claim.

2. Whether the entry of a Consent Judgment in an employee's third party tort action, which judgment is entered for the purpose of confirming a compromise or settlement, operates, under Section 933(g) of the Longshoremen's and Harborworkers' Act (Title 33 U.S.C.), to bar additional compensation?

3. Whether the Trial Court erred in finding, on the basis of uncontradicted evidence, and in concluding as a matter of law, that the Consent Judgment entered in plaintiff's third party tort action was entered for the sole purpose of confirming a settlement and compromise of the third-party claim, and therefore barred additional compensation pursuant to Section 933(g) of the Longshoremen's Act because the employer did not give written consent to said compromise?

4. Whether a Consent Judgment in the amount of $5,000.00 entered for the purpose of confirming a compromise of an employee's third party tort action for that amount,

which apportions $3,000.00 of said amount to the employee's wife for loss of consortium and $2,000.00 to the injured employee constitutes an adjudication of the claim where no witnesses are sworn or testify, where a jury is not empanelled and the Court never convened?

5. Whether the trial court erred in sustaining the Deputy Commissioner's finding that appellant was entitled to temporary partial disability terminating as of November 1, 1965, and whether appellant's cross-claim and counter-claim raising that issue in the trial court was timely filed under Section 21(a) of the Act.

6. Whether appellant's claim for additional compensation, seeking in effect modification of a prior award of compensation, was timely filed within one year after the date of last payment of compensation under that prior award, as required by Section 22 of the Act.

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COUNTER-STATEMENT OF THE CASE

Appellant was injured in the course of his employment on October 19, 1962. He filed a claim with the Bureau of Employees' Compensation against appellees Morauer & Hartzell, Inc. and Liberty Mutual Insurance Company for workmen's compensation, and an award was entered on August 24, 1964,

ordering payment of compensation for temporary total disability from the date of injury to November 1, 1963.

Prior to that award appellant had instituted an action in the United States District Court in this jurisdiction (Alexander McClanahan, et ux. v. Ray Gains, Inc., Civil Action No. 1895-63) to recover damages for negligence from a third party he alleged was responsible for his injury. On March 3, 1967, without notice to or written approval of appellees, a "consent judgment" was entered in that action in the total amount of $5,000.00. Of that amount $3,000.00 was in favor of appellant's wife and $2,000.00 was in favor of appellant, and of the latter sum, after deduction of attorneys' fees, $1,200.00 was remitted to the appellee insurance carrier.

On August 28, 1964, appellee insurance carrier filed a form (BEC-208) with the Bureau of Employees' Compensation showing that it had made payment in accordance with the award of August 24, 1964. (Tr. 4) On July 26, 1967, appellant filed a claim for additional compensation, seeking an award for permanent total disability (Tr. 5-6). After hearings on December 11, 1967, and March 28, 1968, an award was entered for temporary partial disability from November 2, 1963 to October 31, 1965. The Deputy Commissioner therein

found that the claimant's symptoms attributable to his injury terminated as of November 1, 1965, and on that date his condition reverted to its status as it existed immediately prior to the injury on October 19, 1962. The Deputy Commissioner rejected appellees' defenses that the "consent judgment" entered in the court action without appellees' written approval barred any further compensation, that the evidence showed no change, except improvement, in appellant's condition since the prior award, and that appellant's claim for additional compensation, not having been filed within one year after the last payment of compensation under the prior award, was not timely filed under Section 22 of the Act.

Appellees then filed suit in the District Court to review and set aside this award. Appellant intervened, asserting a "cross-claim and counter-claim" that the Deputy Commissioner had erred in not awarding compensation on the basis of permanent total disability. Appellees' motion to dismiss that "cross-claim and counter-claim" on the ground that it was not timely filed within 30 days after the award had been entered as required by Section 21(a) of the Act, was denied.

After hearing and argument, the District Court granted appellees' motion for summary judgment on the ground that the "consent judgment" was a "compromise" of the court action without the written approval of appellees and therefore, under Section 33(g) of the Act, barred any further compensation.

The District Court also denied appellant's cross-motion for summary judgment on the ground that there was substantial evidence to support the Deputy Commissioner's finding of temporary partial disability.

Appellant thereupon noted an appeal. The Bureau of Employees' Compensation also noted an appeal (No. 23,946), but that appeal was dismissed upon its request.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE "CONSENT JUDGMENT" WAS A "COMPROMISE" BARRING FURTHER COMPENSATION.

On February 20, 1967, the date set for the trial of appellant's court action against the third party, counsel for the parties met in the chambers of Judge Youngdahl, at which time, Judge Youngdahl discussed settlement of the case with counsel jointly and separately (Tr. 49). Appellant's counsel reduced his demand to $9,000.00 and the third party's counsel offered $5,000.00 (Tr. 56-57). In the discussion, Judge Youngdahl "bandied several figures around", and at some time during the discussion he "felt that the case was worth $5,000.00" (Tr. 49, 56). He in effect prevailed upon appellant's counsel to accept and settle for that amount as offered by the third party subject to appellant's consent (Tr. 50). Appellant then agreed to that settlement in open

court, and a form of "consent judgment" was prepared and signed by counsel for the parties and by the Court (Tr. 44, 53, 59-60). It was stipulated that neither of appellees was given notice of the settlement nor gave their written approval to it (Tr. 51-52).

On its face, this judgment was a "consent judgment" to which the parties consented. It represented only a compromise or settlement of the action and purported to do no more than that. There was no trial on the merits, no testimony offered, no jury was impanelled, and no verdict rendered (Tr. 55, 60-61), and thus the parties' dispute was never adjudicated. Judge Youngdahl's evaluation of the case as being worth $5,000.00 was for the purpose of settlement, where many considerations come into play, such as the odds of recovery, the effect of conflicting testimony and medical evidence, and other matters, all of which differ materially from evaluating and deciding a case from the point of viewof thetrier of facts and the judge of the law. It is clearly only this latter function that can constitute a "judicial determination" of the case.

The two decisions cited by appellant on this point are distinguishable. In Bell v. O'Hearne, 284 F.2d 777 (4th Cir. 1960), the plaintiff accepted the sum of $5,000.00 in

satisfaction of a $6,500.00 judgment that was rendered after a trial. There was in that case, therefore, an actual "judicial determination" of the damages.

In Banks v. Chicago Grain Trimmers Ass'n., Inc., 390 U.S. 459 (1968), there was a jury verdict after trial for $30,000.00, and the trial court ordered a remittitur of $11,000.00. In that case the trial court thus also clearly adjudicated the damages, and a remittitur is in no sense a compromise. Furthermore, as in the Bell case, there had been a trial and jury verdict on the merits.

As both those cases recognize, if there has been such an actual adjudication, there is then no possibility of prejudice to the employer from the employee's "accepting too little for his cause of action against the third party." (Banks v. Chicago Grain Trimmers Ass'n., supra, 390 U.S., at 467).

In both those cases, there had been a trial and adjudication based on sworn testimony. In the instant case, on the other hand, there was a pre-trial settlement in the Judge's chambers that evolved from discussions with the parties and was clearly a "compromise" of the kind which Section 33(g) of the Act requires must receive the employer's written approval or else bar any further compensation. Marlin v. Cardillo, 68 App. D.C. 201, 95 F.2d 112 (1938).

There indeed can be no judicial determination or evaluation of a case unless, as with an order of remittitur, the Judge acts in his judicial capacity, that is, he evaluates the case upon review of sworn testimony and evidence of record. Absent this, as was the situation here, the Judge's expression of his "feelings" of the worth of a case, stated in the course of his participation in pre-trial settlement discussions with the parties' counsel in his chambers, does not constitute his judicial act. Furthermore, there is no indication that Judge Youngdahl in any manner forced or imposed his evaluation upon counsel, but that both counsel felt entirely free from any threat of adverse action by the Judge to accept or reject the $5,000.00 figure. This again stands in sharp contrast to the remittitur procedure in the Banks case where the trial judge, in effect, ordered the plaintiff to accept an amount less than the verdict on pain that he would otherwise grant the defendant's motion for a new trial. (Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S., at 461).

In answer to appellant's contention that the District Court erred in failing to apply the "substantial evidence" rule when it held that the Deputy Commissioner's finding on this point was erroneous, to the extent that that rule may

apply, there was in fact, as argued above, no "substantial evidence" to support the findings of the Deputy Commissioner that the "consent judgment" was a "judicial determination". This issue, however, is a question of law, being whether the Deputy Commissioner had jurisdiction to entertain appellant's claim, and thus is an issue upon which the District Court had full competence to decide for itself.

II. THE ISSUE WHETHER THE DEPUTY COMMISSIONER ERRED IN FINDING TEMPORARY PARTIAL DISABILITY WAS NOT TIMELY RAISED HEREIN, BUT, IN ANY EVENT, THE DISTRICT COURT PROPERLY HELD THAT SUCH FINDING WAS SUPPORTED BY "SUBSTANTIAL EVIDENCE"

A. Section 21(a) of the Act requires that actions to enjoin and set aside workmen's compensation awards be brought within 30 days of the entry of the award after which the award becomes final. The award here was dated and filed on August 12, 1968, but appellant's "Counter-claim and Cross-claim" raising for the first time the issue of the lawfulness of the finding of temporary partial disability was not filed and served until January 14, 1969. The cross-claim and counter-claim charged that the order was unlawful and not supported by the evidence and thus was an appeal from and attack upon that order and an effort to have it suspended and set aside. Since, therefore, the cross-claim

and counter-claim raising this issue was not filed within 30 days from the date of the order, it is not timely and must be disregarded as not within the court's jurisdiction. Associated Indemnity Corp. v. Marshall, 71 F.2d 420 (9th Cir. 1934); Shugard v. Hoage, 67 App. D.C. 52, 89 F.2d 796 (1937).

B. On the merits of the issue thus sought to be raised, the Deputy Commissioner's finding that appellant sustained temporary partial disability that ended as of November 1, 1965, and at that point his condition reverted to its pre-injury status, was clearly supported by the substantial evidence of record.

At the hearing, appellant's medical witness was Dr. Marvin Korengold, a specialist in neurology (Tr. 9). From a neurological standpoint, there is no dispute that Dr. Korengold testified that appellant's disability was "zero" (Tr. 28). Appellant relies upon Dr. Korengold's testimony that he believed appellant was emotionally disabled and that the accident aggravated his pre-existing condition (Tr. 28-29), but in saying this, Dr. Korengold testified: "From an emotional point of view, this really becomes a psychiatric determination, which I don't know would be fair of me to state." (Tr. 28). Further, at transcript

page 33 the following colloquy took place regarding Dr. Korengold's testimony:

> Q. "But you have indicated, I think, that since we are dealing with the emotions, it is more peculiarly the field of the psychiatrists both as regards diagnosis and treatment?"
>
> A. "I think basically this is true, yes."

On the other hand, as noted in appellant's Brief (page 4), there is of record, as offered by appellees, a report, dated December 23, 1965, by Dr. Leon Yockelson, a psychiatrist, in which Dr. Yockelson found after a thorough examination of appellant and a study of his past records that there was no relationship between his complaints and his injury on October 19, 1962.

Such evidence of record provided a substantial basis for the Deputy Commissioner to conclude, as he did, that appellant should be paid on the basis of temporary partial disability from November 2, 1963, to October 31, 1965, and that on November 1, 1965, his condition reverted to what it was immediately before the injury. Under accepted law, the Deputy Commissioner's findings on questions of fact and credibility of witnesses must be accepted if supported by "substantial evidence". Cardillo v. Liberty Mutual Insurance Company, 330 U.S. 469, 477-78 (1947); O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951);

Voehl v. Indemnity Insurance Company of North America, 288 U.S. 162, 166 (1933); Banks v. Chicago Grain Trimmers Ass'n., Inc., 390 U.S. 459, 467 (1968); J.V. Vozzolo, Inc. v. Britton, 126 U.S. App. D.C. 259, 263-4, 377 F.2d 144, 148-9 (1967).

III. APPELLANT'S CLAIM FOR ADDITIONAL COMPENSATION WAS NOT TIMELY FILED.

Section 22 of the Act requires that claims for modification of awards must be filed within one year after the last payment of compensation under the award sought to be modified. Here, the last payment of compensation under theaward of August 24, 1964, was paid to appellant on August 28, 1964 (Tr. 4), and the claim for additional compensation was filed on July 26, 1967. Appellees submit these facts show that appellant's claim for additional compensation was not timely filed. While the District Court did not find it necessary to reach this point because it held that Section 33(g) of the Act barred any further compensation, appellees wish to reserve this point as an added basis upon which the order of the District Court may be supported.

CONCLUSION

For the foregoing reasons, appellees respectfully

submit that the order of the District Court must be affirmed.

Respectfully submitted,

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Attorneys for Appellees

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed, postage prepaid, this____day of_____, 1970, to John Louis Smith, Jr., attorney for appellant, 850 Washington Building, Washington, D.C., and to Charles B. DeShazo, attorney for appellant, Southern Building, Washington, D.C.

James C. Gregg

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 23945

MORAUER & HARTZELL, INC.

AND

LIBERTY MUTUAL INSURANCE COMPANY

APPELLEES

VS.

ALEXANDER McCLANAHAN

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Did the trial court make a finding that there was not substantial evidence to support the deputy commissioner's finding that the consent judgment entered into between the appellant and the third party tort feasor was the result of a judicial evaluation.

2. Did the trial court commit error in reversing the deputy commissioner and ruling that there was not substantial evidence to support a finding that the consent judgment was the result of a judicial evaluation.

3. Did the trial court error in ruling to deny appellant's cross motion for summary judgment based upon his cross-claim.

Statement pursuant to Rule 8(b)

THIS CASE HAS NOT PREVIOUSLY BEEN BEFORE THE COURT.

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 23945

MORAUER & HARTZELL, INC.

AND

LIBERTY MUTUAL INSURANCE COMPANY

APPELLEES

VS.

ALEXANDER McCLANAHAN

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from an order of the United States District Court for the District of Columbia issued on November 14, 1969, denying appellant's motion for Summary Judgment and granting appellees' motion for Summary Judgment. Notice of Appeal was filed on February 16, 1970. The time for filing appellant's brief was extended to May 11, 1970. Jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. Section 1291 as amended.

REFERENCES AND RULINGS

Bureau of Employees' Compensation Award dated August 24, 1964

Consent Judgment of March 3, 1967

Bureau of Employees' Compensation Award dated August 12, 1968

Order of November 14, 1969 (Granting appellees' Motion for Summary Judgment)

STATEMENT OF THE CASE

On October 19, 1962, Alexander McClanahan, appellant, was injured at the place of his employment when he was struck on the head by pipes which fell. A claim was duly filed with the Bureau of Employees' Compensation. On August 24, 1964, appellees' were ordered to pay compensation to the appellant for temporary total disability at the maximum rate of $70 per week for a period from October 20, 1962, to November 1, 1963. The total award was $3,780.00.

Appellant also filed a civil action, No. 1895-63, against the third party tort feasor, Ray Gains, Inc. This case was certified to Judge Luther Youngdahl for trial on February 20, 1967. That morning Judge Youngdahl called counsel for both parties into his chambers and advised them that he had read the file over and from his years of experience had arrived at what he considered a fair evaluation of the claim. After discussions with counsel for both parties, separately and together, the judge's efforts resulted in a consent judgment which was based on his evaluation of the case.

Written consent was not obtained from the compensation carrier, appellee Liberty Mutual Insurance Company or the appellant's employer, Morauer & Hartzell, Inc. Neither did either of these parties participate in the meetings held in Judge Youngdahl's chambers.

Appellant then filed a claim before the Bureau of Employees' Compensation seeking to modify the award of August 24, 1964. A hearing was held pursuant to this claim at which Dr. Marvin Korengold testified on behalf of the appellant. During the course of the doctor's testimony the Deputy Commissioner asked for his opinion as to the extent of appellant's injury; whether it was permanent or temporary. This colloquy followed:

> Witness: From a neurological view his disability is zero, in terms of neurological testing and functioning. From an emotional point of view, this really becomes a psychiatric determination, which I don't know would be fair for me to state. But from what I have been able to see and observe of this man, I feel he is emotionally seriously disabled. And I am not taking the position that he is emotionally disabled at this point because exclusively of the accident, or even necessarily in part because of the accident. I am taking the position that the accident increased his emotional stress and helped to fixate in some way this man upon his emotional symptoms.
>
> Deputy Commissioner: You feel, then this injury aggrevated his pre-existing emotional problem. Is that right, doctor.
>
> Witness: Yes ....
>
> Deputy Commissioner: Do you feel he is totally diaabled from performing any type of work.

Witness: From a physical point of view - no.

(Then further on)

Witness: From an emotional point of view, I cannot visualize this man working, unless the psychiatrists are able to help him. (Transcript pages 28 and 29)

The only other medical testimony submitted at the hearing was a letter from Dr. Leon Yockelson to John F. Mahoney, Esquire, a member of this Bar and counsel for Ray Gains, Inc., in the third party suit. The letter which is dated December 23, 1965, was, according to its contents, based upon a two hour interview with the appellant five days earlier. This was over three years after the accident and just two years prior to the hearing.

It concluded with the following paragraph:

> "Mr. McClanahan has a history of both periods of anxiety and of an unstable, inadequate and dependant personality. I have no evidence that his personality at this time is any different than what it had always been during his adult years and therefore conclude that there is no relationship between his complaints and the events of October 19, 1962."

John F. Mahoney, Esquire, was called by the appellees to testify concerning the discussions with Judge Youngdahl. His testimony is covered on pages 49-64 of the transcript. He testified that as a result of a conference in Judge Youngdahl's chambers an "agreement was reached at $5,000.00"; that "at some time during the discussion Judge Youngdahl felt that the case was worth $5,000.00" (T 49; that there were no discussions between the parties without the presence

of the judge; that "all of the settlement discussions took place either between the judge and the plaintiff's attorney or the judge and (the third party's attorney) or the judge and both (of the attorneys)". (T 52-3); that of the $2,000.00 claimant received as the result of the consent judgment, $800.00 went for attorney's fees, while the remaining $1,200.00 was paid to the employer's insurance carrier as a reimbursement for disability benefits it had paid claimant under the prior compensation order filed August 24, 1964. (T 61-2).

On August 12, 1968, Deputy Commissioner E. D. Woodworth made a modification award based in part on the following pertinent findings of fact:

> "6. That the consent judgment filed on March 3, 1967, and signed by Judge Youngdahl, and co-signed by the attorney for the claimant and attorney for the defendant represented a judicial determination of the damages recoverable from the third party; that no compromise was effected thereby within the meaning of section 33 of the Act, thus, the written approval of the employer and the insurance carrier was not required for such consent judgment;
>
> "7. That as a further result of the injury, the claimant continued to suffer from periodical headaches and discomfort and manifestations of aggrevations of a pre-existing anxiety reaction; that for such temporary partial disability he is entitled to 104 2/7 weeks' compensation based on a 25 percent impairment of earning capacity at the rate of $22.33 per week (66 2/3 percent of $33.50, the difference between $134.00, the average weekly wages at the time of injury, and reduced weekly earning capacity of $100.50) from November 2, 1963, to October 21, 1965, inclusive, in the amount of $2,328.70;

"8. That as of November 1, 1965, the claimant's emotional and functional symptoms due to the injury terminated and his condition reverted to his status which existed immediately prior to the injury of October 19, 1962."

Appellees filed a motion for Summary Judgment in the United States District Court for the District of Columbia after appealing the ruling. It was based on three grounds for which they contend there was a lack of substantial evidence to support the findings of the deputy commissioner. They are (1) appellant's claim was not timely filed, (2) there was no evidence of any change in claimant's condition warranting a modification of the earlier award, and (3) that the consent judgment was a compromise to which appellee's had not given their written approval thereby causing any further compensation to be barred.

Appellant filed a motion to intervene accompanied by a cross-claim. He then filed a cross-claim for Summary Judgment on the grounds that there was not substantial evidence to support the findings that appellant should only be entitled to a temporary partial disability (25% impaired) from November 2, 1963, until October 3, 1965.

A hearing on the cross-motions for Summary Judgment was held before Judge George L. Hart on November 11, 1969. After hearing arguments by the appellee, appellant and the United States, Judge Hart granted the appellee's motion for Summary Judgment on the grounds "that the said judgment was entered for the purpose of

confirming a compromise or settlement, that (appellee) had not given their prior written approval to said settlement, and that additional compensation was therefore barred by the provisions of Sec. 33(g) of the Longshoremen's & Harbor Workers' Act, Title 33 U.S.C. 933(g).

At the same time Judge Hart denied appellant's motion for Summary Judgment which was mooted by his ruling.

ARGUMENT

I. THE TRIAL COURT DID NOT RULE ON THE QUESTION BEFORE IT WHICH WAS TO DECIDE WHETHER OR NOT THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE DEPUTY COMMISSIONER'S FINDINGS

The standard of judicial review in cases arising under the Longshoremen's and Harborworkers' Act has been well established by the United States Supreme Court. If the findings of the deputy commissioner are supported by substantial evidence, O'Leary v. Brown-Pacific-Masion, Inc., 304 US 504; Banks v. Chicago Grain Trimmers' Assn., Inc., 390 US 459, reh. denied, 391 US 929, or if the deputy commissioner's holding is not "irrational", O'Keeffe v. Smith, Hinchman & Grylls, 380 US 359, 363, or if the order under review is not "forbidden by law", Cardillo v. Liberty Mutual Insurance Company, 330 US 469, 478, the decision of the deputy commissioner is to be sustained.

This principle has been reiterated in this circuit in many cases. In one of the earlier cases, Grooms v. Cardillo,

119 F2 697, 73 App DC 358, the court stated:

> "The rule by which we are bound in cases of this character has been stated by us innumberable times. We may not set aside the order of the deputy except where it appears that there is an error of law or that the finding is not supported by substantial evidence or perhaps where it is clearly arbitrary and unreasonable. It is of no consequence that we might have reached a different conclusion or that there is a sharp conflict in the testimony or even that the evidence preponderates strongly against the view expressed by the deputy. We cannot substitute our judgment for the deputy's judgment, nor can we weigh the evidence. Potomac Power Co. v. Cardillo, 71 US App DC 163, 107 F2 962; Maryland Casualty Co. v. Cardillo, 71 US App DC 160, 107 F2 959; Williams v. American Employers' Ins. Co., 71 US App DC 153, 107 F2 953; Maryland Casualty Co. v. Cardillo, 70 US App DC 121, 104 F2 254; Employers Liability A. Corp. v. Hoage, 67 US App DC 245, 91 F2 318; Aetna L. I. Co. v. Hoage, 64 US App DC 185, 76 F2 435; Employers Liab. Corp. v. Hoage, 63 App DC 53, 69 F2 227."

Appellant contends that the trial court did not follow the law as above-stated but instead substituted his own opinion on the question of whether or not the consent judgment signed by Judge Youngdahl was the result of a judicial evaluation. This was a factual question. Appellee raised it at the hearing before the Deputy Commissioner as his grounds to disallow further payments. Appellce called the only witness to testify under oath on the question, John F. Mahoney, Esquire. Mr. Mahoney was one of the participants at the discussions with Judge Youngdahl and he testified fully before the commissioner as to what transpired.

Once this issue was resolved by the deputy commissioner the United States District Court judge was limited by law to only rule whether or not there was substantial evidence to support the finding. If in fact there was substantial evidence to support the finding then the law requires the trial judge to sustain the award.

Judge Hart in his findings of fact to support his Order granting appellees' motion for summary judgment did not even mention the subject of substantial evidence. It is submitted that he in fact substituted his judgment for that of the commissioner and simply concluded that it was impossible for a trial judge to make a judicial evaluation under the facts presented. The deputy commissioner's finding has not been found to be irrational or to be forbidden by law.

Appellant respectfully submits that because the trial judge failed to follow the law, as stated above, his granting appellees' motion for summary judgment was error.

II. TRIAL COURT ERRED IN RULING THAT THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING BY THE DEPUTY COMMISSIONER THAT THE CONSENT JUDGMENT WAS THE RESULT OF A JUDICIAL EVALUATION

In the event that it is held that the trial judge did rule within the scope of review authorized by law, appellant contends that there was error in his holding. The deputy commissioner's

finding on the question of judicial evaluation was supported by substantial evidence.

As stated above, the appellee introduced the evidence on the question in the form of testimony by one of the participants of the conferences in Judge Youngdahl's chambers. In this testimony, John F. Mahoney, Esquire, related that at some time during the discussions the judge gave his view that the case was worth $5,000.00.

It is contended that Judge Youngdahl's role was no different than that of the trial judge in the recent Supreme Court decision of Banks v. Chicago Grain Trimmers' Assn., 390 US 467, 88 S Ct 1140. In that case there was a jury verdict of $30,000.00 in the third party tort feasor suit. The trial judge ordered a remittitur of $11,000.00. Obviously, he had evaluated the claim at $19,000.00. Nobody sought the approval of the compensation carrier and so they claimed as here that they were not responsible for any further payments under the Act. The U. S. Court of Appeals reversed an allowance of further payments under the Act. The Supreme Court reversed the U. S. Court of Appeals judgment finding that the remittitur was a judicial evaluation of the claim and therefore there had been no compromise made without the approval of the carrier.

Are we to hold that it is necessary to first have a trial before the judge's evaluation of the worth of the claim can be

recognized? What is the difference between a judge ordering a remittitur based on his evaluation of the claim after the trial and the judge stating before the trial the value that he puts upon the claim? We submit there is no difference.

In Banks the Supreme Court found that the acceptance of the remittitur figure did not result in a compromise of a settlement barring further recovery from compensation. Would not counsel be justified in assuming that if the jury came in with a figure in excess of $5,000.00 there would be a good probability that the judge would have ordered a remittitur? Or why should this figure vary from the amount the judge would have awarded sitting without a jury? There is nothing in the Act which says that you must have a jury verdict.

It is further asserted that there is no reason to force upon a person who has not worked in five years the additional hardship entailed in the expenses for medical testimony. This is especially true when the medical evidence submitted by appellees did not refute the fact that appellant suffered from mental illness. In fact it asserts that he has suffered from mental problems his entire adult life.

Section 933(g) of the Longshoremen's & Harborworkers' Act states:

> "If a compromise with such third persons is made by the person entitled to compensation or such

> representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

Its purpose is to assure that settlements are not made which would be prejudicial to the employer and his carrier and give rise to double recoveries. As to the second part, this case does not involve double recoveries. Of the $2,000.00 he received under the Consent Judgment, $800.00 went for attorney's fees and the balance was turned over to the insurance carrier because of their lien.

As to the question of prejudice, it is to be noted that in recent years Sec 933(g) has not been as strictly construed as it was back in the 1930's when this court affirmed the denial of further compensation because of a settlement.[1]

> "In the absence of language plainly demanding it, a construction is not to be favored which visits a forfeiture on the employee or his dependants and gives a windfall to the insurance carrier. The Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." Bell v. O'Hearne, 284 F2 777.

In the above cited case a widow sued the third party for death benefits and was awarded a judgment for $6,500.00. She then settled this judgment for $5,000.00 and sought further compensation under the Longshoremen's Act. No consent had been obtained from

[1]Marlin v. Cardillo, 68 US App DC 201, 95 F2 112

the issuance of the time of compromise. When it was ruled that her claim was barred because she did not get the approval of the insurance carrier she appealed. After tracing the history of the cases interpreting Sec 933(g) of the Act, Judge Simon Sobeloff ruled that there was no prejudice to the insurer since there had been a judicial determination made by a trial judge. The fact that the case was later settled without the consent of the employer was beside the point; what mattered was that the damages were evaluated by means other than negotiations between the two parties, plaintiff and the third party tort feasor.

> "Where, however, there has been a judicial determination of the damages, there is no possibility whatever of prejudice to the employer from the judgment creditor's consent to a diminution in damages." Bell v. O'Hearne., supra.

The Longshoremen's & Harborworkers' Act was modeled on the New York employee's compensation statute.[2] The appellate courts in New York have moved in a direction that avoids strict interpretation which cause harsh results under their "compromise" clause. In a recent case they held:

> "The judgment, which claimant recovered in his third party action, represents the trial court's evaluation

[2]Banks v. Chicago Grain Trimmers' Assn, supra; Lawson v. Suwanee Fruit & SS Co. 336 US 198, 205, 69 S Ct 503, 506, 93 L Ed 611; H.R, Rep. No. 1190, 69th Cong. 1st Sess, 2.

of the damages sustained and was not the result of any settlement between the parties. Hence, the carrier's consent was not required." Klump v. Erie Co. Highway Dept., 91 NYS2 689, affirmed, 275 App Div. 1017.

On the basis of the above premises it is averred that the consent judgment signed by Judge Youngdahl was the result of his judicial evaluation of the appellant's claim. Therefore, it was not prejudicial to the employer or the carrier. Any other result would not be in conformance with the purpose of the statute and would amount to a windfall to the carrier.

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT BASED ON LACK OF SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF ONLY TEMPORARY PARTIAL DISABILITY

At the same time the trial judge granted appellees' motion for summary judgment he denied the appellant's cross-motion which was grounded on the lack of substantial evidence to support the finding that appellant was only entitled to be compensated for temporary partial disability (25% impaired) for a period extending from November 2, 1963, to October 31, 1965.

In his findings of fact the deputy commissioner held that those emotional and functional symptoms due to the injury terminated on November 1, 1965, and that the appellant's condition reverted to his status which existed immediately prior to the accident. Such a finding is not supported by any testimony before the deputy commissioner. Appellees' medical evidence embodied in the two year

old letter from Dr. Yockelson disassociates the appellant's mental condition from the injury. In stating that there was no relationship between his present condition and the accident, the letter states that appellant was suffering from a continuing illness which existed throughout his adult life.

When asked at the hearing to give his opinion as to the extent of the appellant's injury, Dr. Korengold answered: "From an emotional point of view, I cannot visualize this man working, unless the psychiatrist are able to help him."

There is no evidence that any psychiatrists have since been able to help him. There is no evidence in the record to show that the appellant is only partially disabled or that he has been cured to the point where he can return to work.

Furthermore, there is no evidence upon which the deputy commissioner could base his finding that appellant's emotional and functional symptoms due to the injury terminated on November 1, 1965, and that his condition reverted to his status as existing prior to the injury. It is submitted that it is impossible to divide the appellant's injury in this manner and then refer to it as a "condition" or "status".

What the deputy commissioner has done is not to say that the appellant's condition is improved to the extent that he is able to return to work. No, what he has done is merely to assign a before

and after status to his condition. He is arbitrarily holding that as of November 1, 1965, the condition which has not changed is no longer the result of the aggravation of the pre-existing condition.

In Howell v. Einbinder, 121 US App DC 312, 350 F2 442, this court stated that although it was bound by the findings of the deputy commissioner when supported by substantial evidence, this did not mean that the court was required to accept "an ultimate finding or inference if the decision discloses that it was reached in a manner which cannot be accepted as valid."

It is submitted that the finding in this case was obtained in an invalid manner.

> "In a negligence case, the question is not what the accident would have done to a different man but what it actually did to its victim. This is equally true in compensation cases. Therefore, the employer must, in general, compensate the workman for the consequences of an accident although his previous defects cooperated in producing them." National Homeopathic Hospital Assn. of DC v. Britton, 79 US App DC 309, 147 F2 561

If one injures a person who suffers from a defect and the tort causes more serious damage to him then it would to a person who is whole the law of torts makes the tort feasor suffer the penalty under the maxim that you take your plaintiffs as you find them. Since there is no way that the appellant's condition from the injury can be separated from the condition that pre-existed,

the deputy commissioner must rule that he is permanently totally disabled. Appellant was working before the accident and he has not been able to work since.

CONCLUSION

In the light of the premises stated appellant submits that the Court below erred in one of two ways in relation to appellees' motion for Summary Judgment. That it either did not make a finding as to the question of substantial evidence to support the deputy commissioner's finding below or in the event that it should decide that the trial court did make such a finding that the findings of the deputy commissioner should have been found to be supported by substantial evidence. The finding by the deputy commissioner which the trial court overturned is that which stated that the consent judgment in the third party tort feasor case was the result of a judicial evaluation of the claim.

It is also respectfully submitted that the trial court erred in denying appellant's motion for Summary Judgment. That is, that it should have ruled that the medical evidence adduced at the hearing before the deputy commissioner only allowed one finding. The appellant is still suffering from the injury to the pre-existing condition and that he should receive an award of permanent total disability.

Respectfully submitted,

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BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,951

UNITED STATES OF AMERICA,

Appellee,

v.

WILLIAM H. BROADUS,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Issues Presented

1. Should the in-court identification testimony of witnesses be suppressed where they have viewed isolated mug shots of the defendants shortly before trial?
2. Does the defendant have a Sixth Amendment right to the assistance of counsel at a photographic identification subsequent to arrest and indictment where the purpose of the identification is trial preparation?
3. Was it reversible error for the court to exclude impeachment evidence contained in an official summary of his Grand Jury testimony on the ground that the witness had clarified or denied the earlier statements?
4. Was it error for the court to exclude impeachment evidence contained in the summary of the Grand Jury testimony of two witnesses, where statements contained in the summary were not specifically attributed to one or the other?

This case has not previously been before this court.

Table of Citations

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*/ Cases upon which appellant places principal reliance are designated with an *.

References to Rulings

1. Appellant's motion to suppress the in-court identification testimony of the witness Gutierrez was denied from the bench. Tr. 88, 119.

2. Appellant's motion to suppress the in-court identification testimony of the witness Gottlied was granted from the bench. Tr. 118-119.

3. Appellant's motion to suppress the in-court identification testimony of the witness Garden was denied from the bench. Tr. 208.

4. The court ruled from the bench that the summary of the Grand Jury testimony of Gutierrez and Gottlied was inadmissible for impeachment purposes. Tr. 46-48.

5. The court ruled from the bench that the summary of the Grand Jury testimony of Officer Garden was inadmissible for impeachment purposes. Tr. 209-212.

6. The court denied from the bench the joint motion of the defendants for severance. Tr. 8.

LIST OF DOCUMENTS, ITEMS AND PAGES OF TRANSCRIPT UPON WHICH APPELLANT RELIES

Defendant Broadus Exhibits Nos. 1-A and 1-B.

Transcript Pages 5, 23-27, 29-32, 34-35, 37, 40-42, 44-49, 56-60, 69-70, 72, 74-75, 79-81, 84-88, 95-96, 101, 108-109, 116-119, 132-134, 166-170, 182-184, 197-198, 201-205, 208-216.

Form No. USA-9x-65, summary of testimony of Ernest B. Gutierrez, Martin J. Gottlied and Officer John L. Garden, appended to Brief of Appellant.

IN THE

UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

William H. Broadus appeals from a judgment of conviction entered by the United States District Court for the District of Columbia after a jury found him guilty of having robbed Ernest B. Gutierrez and Martin J. Gottlied of two watches and a five-dollar bill, in the District of Columbia, on May 1, 1969. After trial before the Honorable John Lewis Smith, Jr. verdict was rendered

on November 10, 1969; a sentence of from two to six years was imposed. From that judgment Mr. Broadus appeals. */

This case is about an orange shirt. The gist of Mr. Broadus' appeal is that the manner in which the prosecution induced the witnesses to testify, and the jury to believe, that he had been wearing that shirt on the evening of the robbery, was impermissible.

On May 2, 1969, at approximately midnight, Ernest B. Gutierrez and Martin J. Gottlied were walking back to their automobile, which they had parked in a lot at the corner of Eighth and D Streets, N.W. (Tr. 25-26). As they approached the lot, they were passed by a group of four or five men going in the opposite direction. Gutierrez looked back over his shoulder a few seconds later and noticed that the group had retraced its steps and was following them. Gutierrez and Gottlied climbed into their car, rolled up the windows, locked the doors and prepared to back out. (Tr. 26-27).

An instant later, one man appeared on each side of the car. One or both of them put his hands under his shirt to simulate possession of a weapon, and ordered the two in the car to open the doors. (Tr. 30-31, 58).

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*/ Counsel are aware that the usual practice is to refer to defendant below as "appellant" throughout. However, because of the peculiar confusion over names that has attended this proceeding thus far, for the convenience of the court we shall refer to the defendants by name.

Guitierrez and Gottlied conferred for a moment, and then Gutierrez, the owner and driver of the car, opened his door. Gottlied did the same. On request of the two men, they handed over their watches and a five-dollar bill. (Tr. 30-31, 166-68).

They then backed out of the parking lot, and a few minutes later encountered a paddywagon being operated by Officers Garden and Mason. They told the officers that they had been robbed by four or five black men, one of whom was wearing a bright orange shirt.

As the officers responded to the scene, they saw an automobile containing a number of black men. (Tr. 182-83). The driver was wearing an orange shirt. (Tr. 197-98). The officers trailed this car until they arrived at the spot where Gutierrez, having followed the officers on foot, was standing. Gutierrez saw the orange shirt on one of the occupants of the automobile and indicated to the officers that those were the robbers. The officers stopped the car and made the arrest. (Tr. 34-35). They found no weapons.

Three of the people in the automobile were juveniles; the other two were the adult defendants in this case, Edward E. Scott and William H. Broadus. None of the proceeds of the robbery was found on either Scott or Broadus. The five-dollar bill taken from Gutierrez

was recovered from one of the juveniles and Gutierrez's watch was found underneath the right front seat. Gottlied's watch was not found in the car or on any of the suspects and was never recovered. (Tr. 183-84).

The suspects were taken to the precinct and booked. Although the two complaining witnesses went with the police to the precinct and gave them an account of the incident, they had no confrontation with the suspects and did not see any of the five again until the trial of the two adults six months later. (Tr. 60, 75, 101).

The Grand Jury hearing was held twelve days after the robbery. Predicated on Officer Garden's testimony that the orange shirt had been visible in the driver's seat of the (stolen) car when the arrest was made (Grand Jury tr. 12), and on the basis of records indicating that Scott had been the man in the orange shirt, the Grand Jury indicted Scott for Unauthorized Use of Vehicle. (Tr. 23-24).

Trial was scheduled to begin at 10 o'clock a.m. on the morning of November 6, 1969. At approximately ten minutes until nine o'clock on that morning, the prosecuting attorney met with his witnesses in the case--the two complaining witnesses and the two arresting officers--for the purpose of preparing for trial. Shortly into the discussion, after the conversation had turned to the

clothing worn on the evening of the robbery, Officer Garden sent for pictures of the two defendants. (Tr. 72). The two photographs arrived. They were mug shots. The photograph of Edward E. Scott had been taken on the night of the robbery; the mug shot of William H. Broadus had been taken in 1966. (Defendant Broadus' No. 1-A, 1-B). The two photographs were passed to the witnesses, and they were asked to identify the men who had robbed them. (Tr. 69-70). The witnesses agreed that Broadus had been the man on Gutierrez's side of the car; Gottlied identified Scott as the man on his side. (Tr. 95-96). Gutierrez now maintained that the man on his side had been wearing the orange shirt. Officer Garden, who on previous occasions had identified Scott as the man in the orange shirt, at this converence agreed that Mr. Broadus had been wearing the orange shirt at the time of his arrest.

Half an hour later the trial began. At trial it developed that the two complaining witnesses were uncertain as to how many men were involved in the robbery. (Tr. 29-30, 32, 132-34, 168-70). Each of them was certain that he had seen one man on either side of the car, but there was never any unequivocal testimony that any more than two men had participated in the robbery. (Ibid.).

Since none of the stolen items had been found on either Scott or Broadus, and the complaining witnesses

could identify the robbers only on the basis of an orange shirt, the orange shirt emerged as the only possible link between them and the robbery. The identity of the man in the orange shirt was the critical issue in the case.

Mr. Gutierrez testified at trial that Broadus had been the man in the orange shirt on his side of the car. (Tr. 40-41). On cross-examination, the defense elicited, to their surprise, an account of the meeting in the United States Attorney's office. (Tr. 59-60).

The trial was halted and a hearing was held to determine whether the in-court identification testimony of Gutierrez had been tainted by an unnecessarily suggestive photographic identification. The Government did not deny that the showing had been suggestive; the hearing focused on the question of whether there had been an "independent source" for the in-court identification.

The prosecution contended that an on-the-spot identification had been made at the time of arrest. The photographic identification, then, the Government suggested, could not contaminate the prior, valid identification. (Tr. 116-18). The testimony of Gutierrez was, however, insistent on the point that <u>no such on-the-scene identification had taken place</u>. Gutierrez, who was questioned on the point repeatedly, insisted that he had never done anything more than recognize the orange shirt-dark pants

combination. He had never had an opportunity to see the face of the man in the orange shirt. (Tr. 41-42, 79-81, 84).

At the close of the hearing, the defense moved to suppress any in-court identification by Gutierrez on the ground that it had been tainted by the unduly suggestive photographic showing. The court denied the motion, apparently on the ground that there was an independent source for the identification. (Tr. 88).

A hearing was then held to determine whether any identification testimony of Gottlied would have been tainted by the photographic showing. Mr. Gottlied indicated that he had identified the picture of Mr. Scott as being the man on his side of the car and Mr. Broadus as having been on Mr. Gutierrez's side of the car. (Tr. 95-96). He was then asked to lay aside the photographs and to determine on the basis of looking at the two men in court which had been on which side of the car. First identifying the men from the witness stand (the defendants were sitting at the counsel table), he reversed himself, and identified Mr. Broadus as having been on his side of the car and Mr. Scott as having been on Mr. Gutierrez's side. (Tr. 108). When asked to step down from the witness stand and approach the counsel table at which the two defendants were sitting in order to double-check this identification, he confirmed

his judgment, which conflicted directly with the identification that both he and Gutierrez had made from the photographs. (Tr. 109).

The judge thereupon suppressed Mr. Gottlied's in-court identification because "(t)he witness did indicate that he was assisted in his identification by the photos, but more than that, on the crucial identification, he got them switched." (Tr. 118-119).

A hearing was also held to determine whether Officer Garden's testimony that Broadus had been wearing the orange shirt at the time of arrest had been fatally influenced by the photographic showing. At the close of the hearing the court denied the notion to suppress, apparently on the basis of an independent source. (Tr. 208).

Both Gutierrez and Officer Garden were allowed to make in-court identification of Broadus as the man in the orange shirt--testimony that was at considerable variance with the apparent design of the prosecution's case until, so far as the defense could tell, the very morning of trial.

Counsel for defendant Broadus thereupon attempted to impeach Officer Garden's in-court identification by using the summary of his testimony before the Grand Jury. This summary imputed to Officer Garden the statement that the

defendant Scott had been driving the car and wearing the orange shirt.*/

Counsel for defendant Scott objected to the use of these statements because it would plant in the jury's mind the suggestion that Scott had indeed been wearing the orange shirt. Counsel for the Government did not object. The court did not rule on the ground put forth by Mr. Scott, but rather, on its own motion, excluded the summary on the ground that Officer Garden had denied having made the prior statements. The court also excluded the summaries of the Grand Jury testimony of Gutierrez and Gottlied.

The case went to the jury, then, on the in-court testimony of three witnesses, two of whom identified Broadus as the wearer of the orange shirt. On the basis of this evidence, Broadus was convicted of two counts of robbery. Scott was acquitted.

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*/ Defense counsel inadvertently failed to have the Grand Jury summaries marked for identification. The record, however, is replete with references to the summaries and their contents. (Tr. 44-49, 204-05, 290-12). For the convenience of the Court, a copy of the summaries is attached as an appendix to this brief.

ARGUMENT

I. ADMISSION OF THE IN-COURT IDENTIFICATION TESTIMONY, AFTER A SUGGESTIVE PHOTOGRAPHIC IDENTIFICATION, DENIED APPELLANT THE DUE PROCESS OF LAW.*/

The United States Supreme Court and this court have held on many occasions that it violates due process for the Government to show to witnesses either the pictures or the persons of defendants under circumstances calculated to suggest that the individuals seen by the witnesses are the suspects in the case. See, e.g., Simmons v. United States, 390 U.S. 377 (1968); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. State of California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. denied 394 U.S. 964 (1969).

In the totality of the circumstances in this case, the photographic identification, influenced the testimony of all the witnesses on the single critical issue in the case--which defendant had been driving the car and wearing the orange shirt--which produced such a substantial likelihood of irreparable misidentification that the

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*/ This argument is based on Tr. 27, 29-30, 32, 37, 41-42, 56-58, 60, 69-70, 74, 80-81, 84, 88, 119, 201-03, and 213-16.

only redress is suppression of the in-court identification. Simmons v. United States, supra; Clemons v. United States, supra.

The issues on this appeal do not raise mere technicalities. Mr. Broadus was convicted because the jury was led to believe, on the basis of the in-court identification testimony of Gutierrez and Officer Garden, that he had been wearing the orange shirt. The method that the Government used in preparing its witnesses for trial--showing them mug shots of the two defendants less than an hour before the witnesses were scheduled to testify--made the in-court identification utterly unreliable, and deprived Mr. Broadus of his right to a fair trial.

The problem with suggestive photographic showings, as the Supreme Court has pointed out, is that photographic identification is inherently risky.

> ". . . . A witness may have obtained only a brief glimpse of a criminal or may have seen him under poor conditions . . . . This danger [of incorrect identification resulting from improper employment of photographs by police] will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if

> the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness is thereafter apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." Simmons v. United States, 390 U.S. 377, 383-84 (1968). (Emphasis supplied.)

The record of the hearing sets forth the full account of what happened in the pre-trial preparation session in this case. It could function as a textbook example of the evils against which the Supreme Court warned.

The meeting of the witnesses took place immediately before trial, at a time when the pressure to make a positive identification is naturally at its strongest. Only two photographs were produced--mug shots of men whom Gutierrez and Gottlied knew to be the defendants in this case. (Tr. 69, 74). Moreover, all four of the witnesses were invited to view the photographs in the presence of one another, a practice that aggravates suggestivity and compounds error, and very recently condemned by this Court in United States v. Wilson, ___ U.S. App. D.C. ___, ___F.2d ___, No. 23,283 (May 20, 1970).

Indeed, the error here is not only in the suggestive manner in which the pictures were displayed but in the pictures themselves. Not only were the photographs mug shots, but the picture of Broadus was three years old. Officer Garden testified that an old photograph is of no value in refreshing the memory of a witness. (Tr. 197). The old photograph only aggravated the probability that the witnesses in this case had their recollection of the face of the robber obliterated rather than refreshed by the photographs.

At the very least the facts here raise the substantial probability that the conversation among the witnesses before trial undermined the reliability of the in-court testimony. Although Gutierrez identified Broadus as the man on his side of the car who had taken his watch and his five-dollar bill, neither of these items was found on Broadus. (Compare Tr. 32 with Tr. 213). The five-dollar bill was recovered from one of the juveniles; the watch was recovered from underneath the right front seat of the car, a location on the other side of the car from the spot in which Mr. Broadus would have been located if he had in fact been wearing the orange shirt and driving the car. Officer Garden's testimony also

underwent abrupt revision in a questionable direction: although he testified that Broadus had been wearing an orange shirt, his own report prepared contemporaneously with the arrest stated that Broadus had been wearing a leather jacket. He admitted on the stand that these versions were inconsistent. (Tr. 202).

The bare facts of the photographic identification are sufficient to establish a violation of due process. In the total context of the case, moreover, it becomes apparent that there is no possibility of saving the in-court identifications by invoking the doctrine of an "independent source" for them.*/ The very facts adduced by the prosecution in support of the

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*/ In Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), this court, following the mandate of the Wade-Gilbert-Stovall and Simmons line of cases, set out the following procedure to be followed by District Courts when a challenge is made to an in-court identification following a pre-trial identification procedure that is alleged to have been unduly suggestive:

> "The court should then, on facts elicited outside the presence of the jury, rule upon whether a pre-trial identification by the same eyewitness is violative of due process or the right to counsel. If a violation is found, the court should then decide whether the in-court identification is still admissible because it has an independent source; . . ." 133 U.S. App. D.C. at 34, 408 F.2d at 1237.

"independent source" theory go only to confirm that the in-court identification was based entirely on the highly suggestive photographic identification.

In order to rehabilitate the in-court identifications, the prosecution attempted to show by clear and convincing evidence, in accordance with the mandate of Simmons and Clemons, supra, that the witnesses would have testified as they did even had there been no photographic showing. This is a heavy burden. See United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968); United States v. Wilson, 283 F. Supp. 914 (D.D.C. 1968). The prosecution did not meet it in this case, either as to Gutierrez or as to Officer Garden.

The prosecution attempted to salvage Gutierrez's testimony on the theory that he had made an on-the-street identification within minutes of the robbery. Gutierrez testified unequivocally that he had made no such identification.

He was examined extensively on this point. The prosecution maintained that the on-the-street identification had been made when the five suspects were arrested, frisked and placed in the police wagon. Gutierrez, however, repeatedly denied that he made any such identification. He testified on direct examination:

Q. Did you take a look at the five people who were taken out of the automobile by the police that evening?

A. No.

Q. Would you elaborate on that? When you say you didn't look at all?

A. I saw him being removed from the car, but there were so many people and forms moving around that I couldn't identify anyone at that distance.

Q. Did you go up next to them and try to --

A. No, I remained in the squad car.

Q. Did you come up close to any of them at any time during the evening after that?

A. No, Sir. (Tr. 41-42).

On redirect examination, the prosecution again attempted to elicit identification testimony:

Q. Now, in answer to one question, you said -- you answered in the negative that you had not identified your assailant again that evening. What did you mean by that?

A. To his face. In other words, I saw a blur of faces and people and motions. I did see the -- I saw the bright orange and dark pants combination, but the faces, I could not identify. (Tr. 80-81).

On recross-examination by counsel for defendant Scott, the witness further scuttled the on-the-scene identification theory:

Q. And your identification that night was not of the face, was it, of Mr. Broadus?

A. No.

Q. It was just -- it was just that you saw a number of forms and there was this orange shirt and because of the large number of people that were involved you concluded from that that this was one and the same man?

A. Yes.

Q. But not the face?

A. No, not the face. I couldn't see at that distance.

Q. And the photographs that you were shown this morning, don't include clothing do they?

A. That's correct. (Tr. 84).

The critical issue, of course, was the identification of the face, since no record contemporaneous with the arrest indicated which of the persons apprehended had been wearing the orange shirt.*/ Gutierrez never got close enough to the man after arrest to look at his face. The on-the-street identification cannot function as a source independent of the photographic showing as a basis for the in-court identification: the street identification was of a shirt; the in-court identification was of a face.

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*/ Indeed, the police report leaves some doubt whether either adult defendant had been wearing the orange shirt.

The Government's theory of an on-the-street identification collapses in the face of this testimony. Nonetheless, the court denied the motion to suppress the identification testimony of Mr. Gutierrez. The basis for the ruling is unclear. When the motion to suppress was first made, the court simply ruled "your motion to suppress will be denied." (Tr. 88). Later, when commenting on the motion to suppress the identification testimony of Gottlied, the court said "Mr. Gutierrez indicated clearly that he could positively identify and did identify your man. He said that he was not assisted in any way by photographs." (Tr. 119).

The judge evidently misread the testimony, since Gutierrez had indicated on first cross-examination that he had made no identification of Mr. Broadus except on the basis of the photographs (Tr. 60, 69, 70) and had stated emphatically that there had been no on-the-street identification.

Nor was there any identification by Gutierrez at the time of the robbery that would permit any finding that his in-court identification had as its source his opportunity to observe. Indeed, the Government made no attempt to build a record around any such theory.

During the incident, the duration of which was probably less than a minute and might have been "a matter of seconds" (Tr. 57-58), Mr. Gutierrez observed only the person at his car door. His testimony was vague as to the total number of persons he saw at any time. (Tr. 27, 29-30, 37). In the rear view mirror, he saw "forms" (Tr. 30) and "detected a movement" (Tr. 56). Even if one is to believe that the orange shirt was on Mr. Gutierrez's side of the car, neither his observation nor his recollection were impressive. Moreover, Mr. Gottlied's testimony before the Grand Jury -- only twelve days after the arrest -- that the orange shirt had been on his side of the car casts doubt on Mr. Gutierrez's recollection of the entire incident, much less his recollection of the face of the man in the orange shirt. It is significant that even moments after the arrest, the complaining witnesses were able to tell the police only that they had been robbed by a number of black men, and could describe only the clothing of the men. (Tr. 216). They apparently did not volunteer heights, weights or ages. These are not the kind of observations that tend to establish an independent source; these are the kind of observations that support the inference that the photographic showing dominated completely Gutierrez's in-court testimony.

The prosecution did not fare much better in its attempt to produce clear and convincing evidence of an independent source for the identification testimony of Officer Garden. As this court has very recently pointed out, "[t]he presumption is that the in-court identification was the product of the prior photographic . . . identifications." Mason v. United States, 134 U.S. App. D.C. 280, 286, 414 F.2d 1176, 1182 (1969). A finding of an independent source requires evidence that the identification "most probably" rested on an independent basis. Ibid. No such finding is possible with respect to Officer Garden.

The officer's own report should be sufficient to demolish any independent source theory. The routine offense report, the PD 251, indicated that Broadus had been wearing a leather jacket. (Tr. 201-03, 214-15). The summary of his testimony before the Grand Jury indicated that he had identified the defendant Scott as the man in the orange shirt. Both of these reports are flatly inconsistent with the claim he made at trial, after viewing the photographs, that he had seen Broadus driving the car with his orange-shirted sleeve out the window. The conflict between his former reports and testimony and the testimony he gave after the highly suggestive

photographic identification session raises a presumption of taint that cannot be dispelled merely by his unsupported assertion that he would have identified Broadus as the driver of the car in any event. Indeed, the prior records that emanated from him suggest strongly that he would have identified the defendant Scott. There can be no finding of independent source on this record.

II. THE PRE-TRIAL PHOTOGRAPHIC IDENTIFICATION HELD IN THE ABSENCE OF APPOINTED COUNSEL VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

The trial in this case was expected to last no more than one day. It continued for nearly three. Almost two-thirds of the total time was consumed in hearings and argument out of the presence of the jury on the problem of the suggestive photographic identification. The waste of judicial time was most unfortunate. Worse, nothing that happened during those hearings could repair the damage: the identification testimony in this case had been irreparably tainted by the photographic identification.

All of this could have been avoided had defense counsel been present at that pre-trial photographic identification. There would have been no difficulty in their attending the conference, since they were in any case due to arrive in the courthouse for the trial itself.

There was every need for their presence and no justification for their absence.

We urge that, in the exercise of its general supervisory power, this court should lay down a policy forbidding the use of post-arrest photographic identifications where the persons accused of the crime are in custody or can be summoned for a traditional lineup procedure with its inherently greater reliability. We can see no justification for the continued use of post-arrest photographic identification, particularly in cases like this one, where the risks that necessarily attend photographic identification were not offset by any valid consideration of the exigencies of police work. The conspicuous feature of the photographic identification in this case was that it served no function except to smooth the presentation of the prosecution's case-in-chief. This is not a consideration that can be allowed to prevail over the interest of the defendants in obtaining a fair trial.

At the very least, and in any case, photographic identifications like the one that occurred in this case are critical stages in the prosecution that demand the presence of defense counsel.

The concerns voiced by the Supreme Court in United States v. Wade, 388 U.S. 218 (1967), are directly applicable to this situation:

> "Insofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witness against him. . . . And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness -- 'that's the man.'" 388 U.S. at 235-36.

The Supreme Court decided that the potential for prejudice in such confrontations was so great that the lineup must be considered a "critical stage in the prosecution," necessitating the presence of counsel. The problem is just as acute in situations such as that presented in this case. Not only did the pre-trial photographic

identification determine the course of the trial, but defense counsel would never even have known of the photographic identification had the witness Gutierrez not testified in such a way as to pique counsel's curiosity. The fact that Mr Broadus is able to bring to the court's attention this crucial error in his trial is a mere fortuity. That circumstance alone points up the need for counsel.

The right to counsel in this case follows a fortiori from principles enunciated in other recent cases in this area. This court suggested in Clemons that "there are possible variations in the circumstances of arrest and detention where the right to counsel, as well as the demands of due process, will have to be defined and measured from case to case by reference to the reasonableness of the police conduct under the particular circumstances." And it recognized then that "the Supreme Court has, at the least, cast an unmistakable shadow across post-arrest single confrontations at the police station where police lineups are a feasible alternative." 133 U.S. App. D.C. at 34, 408 F.2d at 1237.

In Clemons itself, witnesses were taken to see the prisoner in the cellblock on the day of trial. In United States v. Washington, 292 F. Supp. 284 (D.D.C. 1968), the witnesses were subjected to several suggestive pre-trial confrontations and immediately before the hearing on the suggestiveness issue itself were allowed to leaf through photographs among which those of the defendants were made to stand out.

These practices, which result in irreparable contamination of in-court testimony, are utterly unjustified. It is instructive to contrast them with the kind of considerations that persuaded the Supreme Court not to establish in Simmons a right to counsel at pre-arrest photographic identifications: the importance of photographic identification in criminal law enforcement "from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs." 390 U.S. at 383-84.

There was no question in this case of getting leads to possible suspects, and no exoneration of any of the defendants was intended. The investigatory stage of this prosecution was long since finished, and with it any conceivable justification for using a suggestive photographic procedure without notice to counsel. The same

considerations that established a right to counsel at post-indictment lineup confrontations militate in favor of a right to counsel here.

III. EXCLUSION OF GRAND JURY SUMMARIES SOUGHT TO BE USED FOR IMPEACHMENT PURPOSES WAS REVERSIBLE ERROR.*/

The effect of the admission of the unreliable in-court identification was compounded by the court's refusal to allow the defense to impeach the witnesses on the basis of their prior inconsistent statements that indicated that Broadus had not been wearing the orange shirt and driving the car.

At trial, the prosecution supplied defense counsel with the summaries of the Grand Jury testimony of the two complaining witnesses and the arresting officers The Grand Jury summaries are to be distinguished from the Grand Jury minutes themselves: Before the witnesses go in to testify before the Grand Jury, they give to a clerk a synopsis of their testimony. (See Tr. 48-49). The Grand Jury summaries in this case contained, on the subject of the orange shirt and the driver of the car, information that was not covered in actual testimony before the Grand Jury. Most importantly, they recorded that the man in the orange shirt had been identified as defendant Scott.

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*/ The basis for this argument is found at Tr. 46-49, 204-05, 209-12.

At the hearing out of the presence of the jury, after Officer Garden had testified that Broadus had been wearing the orange shirt, counsel for defendant Broadus cross-examined him with respect to those sections of the Grand Jury summary of his testimony that attributed to him the statement that the defendant Scott had been wearing the orange shirt and driving the car. However, when counsel attempted to bring these statements before the jury -- which were plainly attributed to Officer Garden, and which Officer Garden had previously said he had no reason to believe had been incorrectly recorded (Tr. 204) -- he encountered an unanticipated obstacle.

Counsel for defendant Scott objected to the use of the summaries because they would bring before the jury the fact that at one time Officer Garden had identified defendant Scott as the man wearing the orange shirt and driving the car. The salient feature of the court's ruling excluding the evidence was that the ruling was made on a ground that was not only erroneous but had not been urged by either Mr. Scott's attorney or the Government. The court ruled that the Grand Jury summary could not impeach Officer Garden's testimony because Officer Garden had denied having made the statements in the report.

This was not only a misreading of Officer Garden's testimony, but even if the officer had so testified the official report was still properly usable for impeachment purposes. Here is the full exchange:

(Jury not present in the courtroom)

MR. APPLEBAUM: Your Honor, I have one issue to bring up now, because it will require approaching the Bench.

During the cross-examination of Officer Garden, during the out-of-court hearing there were two documents that I put before Mr. Garden to impeach his testimony or that were inconsistent with his testimony.

One of those was the summary I read to him, in which he indicated that Defendant Scott was wearing the orange sweater and driving the car.

Now, Mr. Kurrle has approached me and asked me if I intended to go through that line of questioning again before the jury, and I indicated that I would.

He said that, of course, he would object at that time. I thought perhaps we might as well do this now, unless Your Honor would rather it occur as it naturally would in the course of cross-examination.

MR. KURRLE: If Your Honor please, as I understand the import of Mr. Applebaum's strategy, it is to, in effect, ask Officer Garden whether the man who was wearing the orange shirt was in fact Mr. Scott, from one of the various statements that are involved.

He said from the witness stand that Scott was not driving the car.

Now, in this cross-examination, as far as the identification is concerned, <u>what would occur just by asking the question would be to put into the jurors' minds that Scott was in fact driving the car, when, in fact, he was not driving the car</u>. (Emphasis supplied).

I think if that were done, I would have to move for a mistrial as concerns Scott, because he was not driving the car.

THE COURT: I think the officer has also stated that that was not his testimony; that there was an error in the minutes.

MR. APPLEBAUM: But, Your Honor, nevertheless it is an official report which impeaches his testimony.

If Mr. Kurrle's objection is to the statement that Mr. Scott was driving the automobile, I would not read that to him.

My only interest is in establishing that the report indicates that Mr. Scott was wearing the orange shirt.

I would certainly be willing to exclude any reference to the driving of the car, which is really not relevant here.

MR. KURRLE: I do not care what is done as far as that is concerned. The point is that Mr. Scott nowhere is identified as wearing the orange shirt and has not been identified by any living witness -- that is, the complainants.

If that type of thing is spelled out, I have the same reasoning for objecting to that, and certainly feel that it would be prejudicial.

THE COURT: What do you want to say, Mr. Flynn?

MR. FLYNN: I think the officer's testimony is clear that it was his own observation that the man in the orange sweater was driving the car; that it was his observation that the man in the orange sweater was Broadus.

Maybe we ought to check this out with him now, but I believe he will say: My report was mistaken in saying that it was Scott. The names were switched.

THE COURT: He has already said that.

MR. FLYNN: That should clarify Mr. Kurrle's objection. He has already said that.

MR. APPLEBAUM: Your Honor, let me just point out that each of the two complaining witnesses have now identified the orange shirt as being on their side of the car. This becomes crucial to our defense.

Mr. Garden may well say that this was a mistake. I think the jury is entitled to evaluate the probative effect of that testimony, because it puts the orange shirt on someone other than our defendant, therefore inconsistent with Mr. Garden's testimony.

MR. KURRLE: For that reason, on the Defendant Scott. Because defense counsel is using a prior inconsistent statement to impeach a particular witness, by so impeaching, one reasonable conclusion from that is that Mr. Scott was wearing the orange sweater. (Emphasis supplied).

THE COURT: Actually, he is not impeaching him, because the officer clarified the situation in his testimony.*/

I will deny your request then. (Tr. 209-212).

. . .

In fact, Officer Garden had not denied making the statements. The court's ruling was based on a misreading of Officer Garden's testimony, and for that reason alone must be reversed. Here is what the officer said when first asked about the statements:

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*/ It should be emphasized that the court was referring to Garden's testimony during the suppression hearing, and not to any testimony given by Garden when the jury was present.

A. It is in the report. The only way that I can explain it is that it is either a misidentification or a typographical error. This I can't say. But the report does say that the driver was identified as Scott. (Tr. 205).

The second time, on redirect examination, in response to an inquiry on the same point, he responded:

Q. Now, in your notes and testimony, in a couple of places you indicated that Scott was the one who had the orange sweater; is that incorrect?

Are you saying that it is incorrect now?

A. Yes, sir. I do not recall saying that Mr. Scott was the one. If I did, it's mistaken identification, and that's the way I have to say it. (Tr. 207).

The third question directed to Officer Garden on cross-examination with respect to the Grand Jury summary had been:

Q. Do you have any reason to think that that testimony, as recorded, was incorrect?

A. Not that I can recall, sir, no sir. (Tr. 204).

Even had the officer denied making the statements, the summary would still have been admissible for impeachment purposes. This point has been squarely settled by Howard v. United States, 108 U.S. App. D.C. 38, 278 F.2d 872 (1960). In Howard, defense counsel had attempted to introduce for impeachment purposes a

summary of an arresting officer's testimony at preliminary hearing. The trial court had excluded the summary on the ground that it was merely a synopsis written by a clerk for which the witness had no responsibility. In reversing, this court pointed out, first, that a prior inconsistent statement could be proved by the testimony of another witness even if the witness sought to be impeached had denied the statement, citing MC CORMICK, EVIDENCE 63 (1954). 108 U.S. App. D.C. at 39, 278 F.2d at 873.

The real issue, the court pointed out, was whether the statement was admissible without an opportunity to cross-examine the clerk who had recorded it. This question was settled by reference to a venerable exception to the hearsay rule:

> "All documents prepared by public officials pursuant to a duty imposed by law or required by the nature of their offices are admissible as proof of the facts stated therein.. . . The reason of the rule is that it would be burdensome and inconvenient to call public officials to appear in the myriad cases in which their testimony might be required in a court of law, and that records and reports prepared by such officials in the course of their duties are generally trustworthy. Olender v. United States, 210 F.2d 795, 801 (9th Cir. 1954)." 108 U.S. App. D.C. at 39-40, 278 F.2d 872, 874 (1960).

The summary of Officer Garden's Grand Jury testimony was, then, plainly admissible for impeachment

purposes.*/ In excluding it, the judge assumed a function properly reserved to the jury: it was the province of the jury, not the court, to weigh the probative value of Officer Garden's dismissal of the record of his prior testimony. Even the manner in which Officer Garden sought to explain away prior official documents went directly to the credibility of his testimony in this case. Exclusion of the impeaching documents was not an acceptable means of resolving the conflict.

The court also erred in not permitting appellant to use the Grand Jury summaries to impeach Gutierrez. There were several inconsistencies between the summaries and the testimony given by Gutierrez at trial The summary indicated, as did the Grand Jury minutes of Gottlied's testimony, that the man in the orange shirt had been on Gottlied's side of the car, not on Gutierrez's side, as Gutierrez testified at the trial. It also indicated, in contrast to Gutierrez's testimony at trial, that he had been successful in getting his car started before the robbers appeared at its windows,

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*/ The defense was not attempting to demonstrate by use of the summaries that the defendant Scott had been wearing the orange shirt and driving the car, but only that Officer Garden had said that he was. The fact that Officer Garden had made the statements was within the first-hand knowledge of the clerk who recorded his testimony.

and indicated that the robbers did not touch either of the witnesses.

The summary in which these statements were contained was a summary of statements taken from both Gutierrez and Gottlied. Some of the statements were directly attributed to one or the other, but the majority bore no specific attribution. The court denied defense counsel the opportunity to use the summary for impeachment purposes, on the ground that it was impossible to determine which statements had been given by Gutierrez and which by Gottlied. (Tr. 46-48). The ruling was erroneous: the statements were clearly admissible under Howard v. United States, supra, and since the statements were attributed to both witnesses, they should have been regarded as a joint statement for the witnesses were equally responsible. Cf. IV WIGMORE ON EVIDENCE § 1069-1071 (1940).

The end result of the admission of the in-court identifications and the exclusion of the Grand Jury summaries was to withhold from the jury all evidence that would tend to contradict the version of the offense that emerged from the highly suggestive pre-trial photographic identification session. Appellant submits that had the jury been informed of the contradictions and inconsistencies in the prior statements of the witnesses and that

at earlier stages there were repeated identifications of Scott as the person driving the car and wearing the orange shirt, there would at the very least have been a question as to whether there was any credible evidence at all to link Broadus to the crime.

IV. DENIAL OF THE MOTION TO SEVER WAS REVERSIBLE ERROR */

Before trial, counsel for both defendants had moved for severance. The reason for this motion was the high probability that the defendants would find themselves seriously at odds during the course of the trial. (Tr. 5-6). This prophecy was fulfilled.

The issue in this trial was which, if either, of the two defendants had been wearing the orange shirt. There is some question as to whether either of the adult defendants had been wearing the shirt and driving the car; however, the immediate problem at trial was that the testimony suggested that the shirt had been on one of the defendants.

This, of course, put the defense counsel at odds. The extent of the division is illustrated by the desire of Mr. Broadus to have introduced into evidence the Grand Jury summaries that indicated Mr. Scott had been driving

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*/ This argument is based on Tr. 5-6, 209-212.

the car and wearing the orange shirt, and the equally ardent desire of Mr. Scott to have this document suppressed. (Tr. 209-12). It therefore became clear during the course of trial that the severance originally requested should have been granted.

CONCLUSION

For the reasons set forth above, the judgment of the District Court must be reversed and the case remanded for a new trial in which all identification testimony by any of the witnesses present at the pre-trial photographic identification session shall be suppressed, on the ground that (1) appellant was denied the assistance of counsel at that session; (2) any in-court identification on the part of the witnesses has been irrevocably contaminated by the highly suggestive photographic identification; (3) furthermore, the Grand Jury summaries shall be admissible for impeachment purposes at the new trial.

Respectfully submitted,

Harvey M. Applebaum

Sallyanne Payton

Attorneys for
William H. Broadus

June 26, 1970

APPENDIX

JT May 14, 1969

United States

vs.

WILLIAM H. BROADUS (22) (N) 1436 Clifton St., N.W.
EDWARD E. SCOTT (28) (N) 1305 Spring Rd., N.W.

No. G.J.

Charge Robbery and UUV

Complainant Herman Finkel, sole owner of the car — Martin J. Gottlieb, Ernest B. Gutierrez

Time 2:00 P.M. — 12:01 A.M.

Date April 30, 1969 (Wed.) — May 2, 1969 (Fri. morning)

Property / Instrument 62 Chevrolet hard-top, torquoise and ~~gxxx~~ cream top, Impala, D.C. Tags 526-749, Ser. #21847B122909-- Compls saw no weapon

Place 16th and Courtland, N.W.--on the street — Parking lot 8th and Pennsylvania Ave., N.W.

HERMAN FINKEL, 1368 Iris St., N.W. — Ra 3-3189
Employed: Retired, but partime at Manhattan Liquors, 1524 K St., N.W. 296-8553

On April 30, 1969, this compl. states he parked his car at 2:00 P.M. in front of
the Church located at 16th and Courtland St., N.W. This compl. locked his car and
gave no one permission to use the car. ~~[illegible]~~ Compl. went to work and when he returned
about 9:00 P.M. the same day, the car was missing. The compl. reported the car missing
to the police. On May 2, 1969, this compl. was called at his home by officer [illegible]
and the compl. was asked to response to the traffic division to claim his car. This
compl. then went to the Traffic Division and identified his car. Compl. states that
the front panel had to be replaced on the car, damages estimated about $70.00. Compl.
also states that a pair of shoes va. at $21.00, a pair of glasses va. at $[illegible], and
a jumping cable va. at $3.98, all property of the compl. Value of the car is about
$600.00.

ERNEST B. GUTIERREZ, 3221 Connecticut Ave., N.W. — 244-8448
Student: American University,

MARTIN J. GOTTLIEB, 2722 Connecticut Ave., N.W. — 265-3105
Student: A G. W. University, also teaches at John F. Kennedy High School in
Montgomery County, 1901 Randolph Rd., Silver Spring, Md. after 3:00 [illegible]-2410

On May 2, 1969, these compls were together at the time of the offense and they were
walking toward the parking lot at 8th and Pennsylvania Ave., N.W. to get their car.
Compl. Gutierrez saw the subjects walking on 8th St. toward Pennsylvania Av. This
compl. became suspicious and told Mr. Gottlieb to get in the car and lock the doors.
Compl. states that the subjects, about 4 or 5 of them, passed the compls as they
were approaching the parking lot. Compls had gotten in the car and as they sat down
and as this compl., Gutierrez, had just started the ignition and they had locked the
doors, the car was surrounded by the subjects. They started to yell for the compls
to open the doors and made gestures to show that they had guns [illegible] they told the compls
that they had guns. When the compls opened the doors, Mr. Gutierrez states he was
parked [illegible] against a wall and the car stalls, so he could not pull out. Then they
asked for the compl's watches and the subject with the orange pullover shirt, later
identified as Scott, ~~[illegible]~~ took the watch belonging to Mr. Gottlieb and another subject
took Mr. Gutierrez's watch. Then they took Mr. Gutierrez's money. Mr. Gottlieb did
not have any money on him. Compl.s state that the subjects did not touch them. Then
they said don't move and for the compl.s to drive away and forget they ever saw them.
The subjects run in different directions. Then Mr. Gutierrez pulled out and headed
south on 8th St. and turned right, and located a police wagon at 9th and F Sts. The
compls told the officers what had happened and gave a description of the subjects.
Then the compls followed the officers back to the area, and when they reached the
parking lot, [illegible] compls saw a car pulling around the corner at 9th and Pennsylvania
Then Mr. Gutierrez yelled to the officers that the subjects in the car were the ones.
Then the officers surrounded the car and apprehended the subjects. Then at the scene
of arrest, the compls positively identified the subjects as they were getting out of
the car. Also at the scene of arrest the ~~[illegible]~~ Mr. Gutierrez positively identified
his watch.

GPO 16—78749-1

BEST COPY AVAILABLE
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United States

v.

WILLIAM H. ~~ESTEN~~ BROADUS (con't)
EDWARD E. SCOTT (con't)

No.

Charge

Complainant

Time

Date

Property
Instrument

Place

PROPERTY OF ERNEST B. GUTIERREZ:

Watch /Technos	$80.00	(Rec. in the floorboard by the front se
Money -one $5 bill	5.00	(Rec. off Lee Johnson, Jr. (Juvenile)

PROPERTY OF MARTIN J. GOTTLIEB:

Watch , Gruin gold 24 jewel sell-winding	$100.00	(Not rec.)

OFFICER JOHN L. GARDEN, #1 District 372-8997
Officer Stephen D. Mason, 1st District 338-6211

These officers were coming south on 9th St. at F when the two compls met the officer and started blowing their horns and yelling and they told the officers they had just been robbed and gave the officers a description of the subjects. Officers then headed back down to 6th and Pennsylvania, ~~xxxx~~ with the compls following at a distance. As they turned east on D St, Officer Mason saw ~~xx~~ one of the Def.'s run across the parking lot. Then as the officers got to the prking lot, they observed a torquoise Chevrolet, (described above) coming out of the parking lot, and the headlights of the wagon were shining directly into the car/~~xxxx~~ from behind. Then they made a right turn on 8th St. and then another right on Penn. Then Officer Garden called for more help. ~~Xxxx~~ As the light was shinging into the car, this officer could see the driver of the car, who was wearing an orange shirt, the driver was later identified as Scott. The clothing of Scott and the fact that there were 5 subjects in the car altogether fit the description of the subjects give by the compls. ~~xxxx~~ wagon together with other scout cars which arrived on the scene surrounded the car and stopped the car for a routine check. Then the compls who had a rrived on the scene ~~xxxx~~identified the subjects as being the ones involved in the robbery, and the officers placed all subjects under arrest and advised them of their rights. They made no statement. Then the officers checked teletype and found that the torquoise auto had been reported stolen on 4-29-68. Officers took the subjects to the central Cell block. On the scene the officers charged all subjects with 207. After subjects were placed into the wagon, officers searched the auto and found in the right front floor board, the compls, Mr. Gutierrez's watch, which he positively identified on the scene of arrest. At the Cell Block the subjects were thoroughly searched and the $5.00 was recovered on Def. Lee Johnson, Jr. No weapons recovered. That was the only $5.00 bill amongst all of them and it was folded in the same way as the compl. had handed it to the subject and Johnson was also identified by the compl. as being one of the subjects on the drivers side of the compl's car at the time of the robbery.

ADDITIONAL WITNESSES:
Lee Johnson, Jr. (B/M 17 years) 1315 16th St., N.W.-- co'def.
Paul Robinson (B/M 17 years) 1331 Belmont St., N.W. #1--co-def.
Richard Lewis Jones, (B/M 15 years) 2019 Fortner Pl., N.W.--co-def.
(ALL U JUVENILES TURNED OVER TO JUVENILE AUTHORITIES)
Sgt. Taylor, #1, and Capt. Fry, #1 District.

GPO 16—78180-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. WILLIAM H. BROADUS, Appellant.	No. 23,951

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of June, 1970, served a copy of the attached document, Brief for Appellant, upon the United States by having a copy delivered to the United States Attorney's Office at the United States Courthouse, Washington, D.C.

Sallyanne Payton
888-16th Street, N.W.
Washington, D.C. 20006

Attorney for Appellant
William H. Broadus